NO. 47641-0-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION, et al., CITIZENS' ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY, CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND, MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE TRUST, and CRAIG DURGAN, and HOOD CANAL SAND & GRAVEL LLC dba THORNDYKE RESOURCE,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE HEARINGS OFFICE, acting through the WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

REPLY BRIEF OF PETITIONERS CITIZENS' ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY, et al.

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I. INTRODUCTION

This reply brief of Petitioners Citizens' Alliance for Property Rights Jefferson County, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (collectively "CAPR") in their appeal of Jefferson County's Shoreline Master Program ("SMP") and its approval by the Growth Management Hearings Board ("Board"), replies to only certain arguments advanced in the responding briefs of Jefferson County ("County") and the Department of Ecology ("Ecology"), relying on their opening brief to carry the arguments, assignments of error, and grounds for reversal.

II. ARGUMENT IN REPLY

A.1.a. RCW 90.58.100 REQUIRES THAT SOCIAL SCIENCES, PARTICULARLY ECONOMICS, BE CONSIDERED BEFORE A SMP IS ADOPTED

Ecology's brief in response, at 30, states "CAPR argues that the County and/or Ecology was required to prepare an economic impact statement." This misses the crux of CAPR's argument. (*See*, CAPR opening brief at 9 to 18.) What CAPR argues is that economic factors are to be considered at each decision point in the development of a SMP, not that a separate, stand-alone document called an "Economic Impact Statement" be prepared. Such

regular consideration of economics is what the Shoreline Management Act intends when it calls for "the *integrated* use of the natural and social sciences ....) RCW 90.58.100(1)(a); emphasis added.[1]

Arguing against CAPR on this point at 31 of its brief, Ecology claims the requirement "to plan for shoreline development while ensuring no net loss" — Ecology's goal if not the Legislature's, see CAPR's opening brief at 34, n. 17 — states this integration of natural and social science is achieved through "use analysis, the [Jefferson County Final Shoreline] Inventory [and Characterization Report], and the Cumulative Impacts Analysis ...." But the Inventory and use analysis are geography — what is where — and the County's Cumulative Impacts Analysis is disproportionately concerned with the natural environment, not the social environment.

In its opening brief at 10, CAPR alleged that nowhere in the 30,000 pages of the administrative record produced by Ecology and the County to the Board is there shown any consideration of economic effects of the SMP strictures on property owners. Neither the County nor Ecology have controverted this allegation in their responses.

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[1] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 3d ed., defines "integrated" as "composed of separate parts united together to form a more complete, harmonious, or coordinated entity ...."

Since Respondents cannot point to anything in the record concerning economic consequences considered prior to adoption of the SMP, they instead point to vague language in the SMP itself. The County Brief at 29 first relies on SMP Article 3.2 at pages 3-1 to 3-2 (Administrative Record ("AR") 586–87; also at Jefferson County Code ("JCC") 18.25.130). In its entirety, this section states:

> Economic Development
> A. Purpose
> As required by RCW 90.58.100(2)(a), the economic development goals address the location and design of industries, transportation facilities, port facilities, tourist facilities, commerce and other developments that are particularly dependent on their location on or use of the shorelines.
> B. Goals
> 1. Encourage viable, orderly economic growth through economic activities that benefit the local economy and are environmentally sensitive. Such activities should not disrupt or degrade the shoreline or surrounding environment.
> 2. Accommodate and promote water-oriented industrial and commercial uses and developments, giving highest-preference to water-dependent uses.
> 3. Encourage water-oriented recreational use as an economic asset that will enhance public enjoyment of the shoreline.
> 4. Encourage economic development in areas already partially developed with similar uses when consistent with this Program and the Jefferson County Comprehensive Plan.

Beyond restating the RCW, this is aspirational boilerplate that does not meet CAPR's argument. It does not discuss *how* this SMP will affect existing or future economic goods in the county. The County next discusses the "feasibility" considerations the SMP might allow during permitting. But

a closer examination of the SMP's use of this concept than the County presents in its bald list of pages where the term occurs (County Response at 29) shows it does not address the economic impacts this SMP will have on current property owners.

SMP Articles 2.F.2 and 3 at pages 2-15 to 2-16 (AR 554–5; also at JCC 18.25.100(6)(b)) state:

> Feasible means for the purpose of this Program, that an action, such as a development project, mitigation, or preservation requirement, meets all of the following conditions:
> a. The action can be accomplished with technologies and methods that have been used in the past in similar circumstances, or studies or tests have demonstrated in similar circumstances that such approaches are currently available and likely to achieve the intended results;
> b. The action provides a reasonable likelihood of achieving its intended purpose; and
> c. The action does not physically preclude achieving the projects primary intended legal use. In cases where these guidelines require certain actions unless they are infeasible, the burden of proving infeasibility is on the applicant. In determining an action's infeasibility, the reviewing agency may weigh the action's relative public costs and public benefits, considered in the short- and long-term time frames.
>
> ....
>
> A determination of what is reasonable or feasible is made by the decision-making body on a case-by-case basis, taking into account the:
> a. Probable intensity, severity, and cumulative impacts of the original proposal and alternative approaches, and opportunity for the avoidance or reduction in the number, intensity, or severity of significant impacts, or of the aggregate adverse impact;

> b. Risk of upset conditions (i.e., the risk that the control and mitigation measures will fail, be overwhelmed. or exceed allowed limits) and the potential severity of the impact should control or mitigation measures be ineffective or fail:
> c. Capital and operating costs:
> d. Period of time to accomplish, costs or additional time or delay, and time constraints for completion: and
> c. Location and site-specific factors, such as seasonal or topographic constraints, environmentally sensitive areas and habitats, site accessibility, and local community concerns.

Whatever this *permitting* language means — and it will mean what the "decision-making body" says it means unless challenged through expensive litigation — it clearly does not meet CAPR's argument that economic effects were to be considered *before* the SMP was adopted.

In its brief at 29, the County lists pages in the SMP where "the application of shoreline regulations and restrictions is conditioned by the 'feasibility' of such restrictions ...." While true, none meet CAPR's argument as can be seen by closer review of a few examples, something the County does not do in its brief.

On page 3-5 of the SMP (AR 590; JCC 18.25.180(2)(c)), "[e]ncourage appropriate sustainable, low impact, and cluster development practices whenever *feasible*." A policy choice, but it is without economic analysis.

On page 4-3 of the SMP (AR 594; JCC 18.25.210(3)(b)): "Purpose [of the Aquatic designation]. The Aquatic designation protects, manages, and where *feasible*, restores lakes, stream, and marine waters and their

underlying bed lands that are not designated as Priority Aquatic." Any economic effect on shoreline property owners will likely be increased costs as the County imposes restoration requirements on permits.

For its proposition that "feasibility" in the SMP shows consideration of economics the County next cites SMP page 6-17 (AR 618; JCC 18.25.290(2(e)) regarding public access: "When physical public access is deemed to be *infeasible* based on considerations 6.3.B.3, the proponent shall provide visual access to the shore or provide physical access at an off-site location geographically separated from the proposed use/developmental (e.g., a street end, vista, or trail system)." Any flexibility here inures against the property owner.

Also on SMP page 6-17 (AR 618; JCC 18.25.290(2)(j)), and again concerning public access to private property as well as public lands, it states: "10. Opportunities for boat-in public access and access to primitive shorelines not accessible by automobile shall be provided where *feasible* and appropriate." This obviously increases the burden on private property owners, both financial and social.

The County's further citations in support of "feasibility" as a stand-in for consideration of economic effects of the SMP (i.e., 6-19, 7-14, 7-18, 7-22, 7-30, 8-16, 8-18, 8-32, 8-34, and 8-36) offer more of the same. None of these cites — or any other thing in the record produced by the County and

Ecology — helps answer the question posed in *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960), whether the SMP is forcing "some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." Until rigorous examination of basic economic facts concerning how much the SMP restrictions and demands are costing shoreline property owners, and to whom any supposed benefits are accruing, one cannot begin to answer the question raised in *Armstrong*.

The *ad hoc* approach gathered under "feasibility" does not meet the demand of RCW 90.58.100(1)(a) for "the integrated use of the natural and social sciences ...." Ecology and the County have ignored integration by ignoring the social sciences, thereby failing to give full effect to all the words in the statute.

> [A] well-settled principle of statutory construction is that "each word of a statute is to be accorded meaning." *State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). " '[T]he drafters of legislation ... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.' " *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (quoting *Greenwood v. Dep't of Motor Vehicles*, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). "[W]e may not delete language from an unambiguous statute: ' "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." ' " *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom*

County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996))).

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005).

Turning to other arguments raised by Respondents, CAPR briefly mentions the following. Ecology snipes at the declaration of Gene Farr[2] concerning SMP effects on property values in the County (Ecology Brief at 39), but chooses not to offer any evidence of its own that CAPR's concerns of deleterious economic effects are unfounded.[3] Instead, Ecology relies on the assertion in the County's Cumulative Impacts Analysis ("CIA") that there is "no evidence of decreased waterfront property values over the past forty years under Shoreline Management Act regulation." Ecology Brief at 39. But at 32–33 Ecology argues that these prior regulations are now inadequate to protect the shore although the County's own expert described the shorelines of the county as generally in good shape. CIA § 2.2, p. 10; AR 2361. If one accepts that 1) property values are a concern worth noticing and that 2) more protection might be warranted, then there is good reason

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[2] Declaration of J. Eugene Farr Re (1) Land Subject to Shoreline Prescriptive Buffer and Setback Imposed by Jefferson County's New Shoreline Master Program, and (2) Impact of These Regulatory Impositions on Assessed Property Value. *See* Petitioners Olympic Stewardship Foundation, et al.'s Evidence Submittal Re Constitutional Claims ("OSF Evidence Submittal").

[3] Ecology's n. 37 at 39, where *it* testifies regarding real property valuation methods, must be dismissed.

for economic analysis regarding the costs of the new SMP on property values. How much more protection should we buy and who will pay for it?

The County's argument that the breaking of the shoreline into SEDs (Shoreline Environmental Designations) (County Brief at 30) meets the mandate for economic consideration is misplaced. SEDs are geography, the simple recognition of past economic activity, not analysis of this SMP's oncoming effects.

In its opening brief, CAPR argued that the County needed to account for the economic effects of creating so many nonconforming structures and uses. At 31 of its brief, the County asserts that the creation of nonconformities is an ordinary and lawful consequence of new zoning. CAPR does not disagree, in principle. But here these consequences result not from replacing commercial zones with residential or agricultural with commercial or a lower value use with a higher value use; rather they result from replacing residential (and other uses) with wild lands, vegetated buffers that are, in the main, untouchable. JCC 18.25.310(2). And it should not be forgotten that the fate of nonconforming structures and uses is to be phased out, permanently replaced. *See* CAPR Brief at 17.

The Board, Final Decision and Order ("FDO") at 67, found that "CAPR has failed to meet either burden of proof to establish violations of RCW 90.58.020, RCW 90.58.100(1) and (2), RCW 90.58.620, WAC 173-26-201

(2) or WAC 173-26-241(3) in regard to the consideration of the social sciences, specifically economics." This finding constitutes clear error on the Board's part and demands the FDO be reversed.

A.1.b. NEED TO COMPLY WITH THE STATE ECONOMIC POLICY ACT

Ecology, at 32, alleges that CAPR's arguments regarding the State Economic Policy Act (chapter 43.21H RCW) "are beyond the scope of this appeal." Why this is so is not argued, just a cite to RCW 90.58.190, a section that points to the APA for the scope of appeals. CAPR never abandoned this issue and has consistently advanced it since its initial petition to the Board. Ecology also suggests that an "economic impact statement"— a phrase not found in ch. 43.21H RCW and not used by CAPR — only pertains to "agency rulemaking." However, Ecology does not argue that the adoption of a SMP is not an agency rulemaking. In its opening brief, CAPR argues the SMP is exactly that. CAPR Brief at 14. RCW 43.21H.020 states that "[a]ll state agencies and local government entities with rule-making authority under state law or local ordinance must adopt methods and procedures which will insure that economic impacts and values will be given appropriate consideration in the rule-making process along with environmental, social, health, and safety considerations."

The "methods and procedures" to be used are not specified; an "economic impact statement" is not mandated, just that "economic impacts and values" be considered in the rulemaking process.

The County in its response to CAPR's ch. 43.21H RCW arguments states in note 7 at 32 that CAPR "acknowledges that this chapter has never been held to require specific economic analysis in a Comprehensive Plan or Master Program." CAPR acknowledges even more. In its opening brief, CAPR observed that ch. 43.21H RCW has never been held by any court to apply to anything except instream rules and that only in dictum. Of course, it is not the duty of courts to apply statutes that the advocates before them have not advanced. The mention of ch. 43.21H RCW in briefs, per Westlaw, is negligible.

The County does not claim, as does Ecology, that CAPR's argument with respect to ch. 43.21H RCW is not before the Court. Assuming, *arguendo*, that there is an argument to be made why it is not, the Respondents have waived it by failing to make "citations to legal authority" as required by respondents under RAP 10.3(b). *See, e.g., State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1995) ("We will not consider contentions unsupported by argument or citation to authority in the appellate brief.").

A.2. PHYSICAL AND BIOLOGICAL SCIENCES DO NOT SUPPORT THE LAND-USE RESTRICTIONS IMPOSED BY THE SMP

Ecology, at 32, relies on WAC 173-26-200(2)(a) to argue against any *general* requirement for additional research. But that is not CAPR's position. This subsection does acknowledge that such further knowledge acquisition can be needed in preparing a SMP. In pertinent part it states:

> While adequate scientific information and methodology necessary for development of a master program *should* be available, if any person, including local government, chooses to initiate scientific research with the expectation that it will be used as a basis for master program provisions, that research shall use accepted scientific methods, research procedures and review protocols.

WAC 173-26-200(2)(a); emphasis added.

CAPR agrees that before 150-foot buffers are mandated in all shorelines, scientific information to justify them *should* be available. To this the Board's FDO at 69 (AR 7521) states:

> What appears to be one of the underlying bases of CAPR's concerns is the SMP's imposition of a standard 150-foot buffer on all marine shorelines. CAPR states there is no scientific justification in the record for that buffer width. To the contrary, the SI [Shoreline Inventory] includes summary references to numerous scientific studies which address varying buffer width recommendations. Those studies focused on the effectiveness of various buffer widths in protecting water quality and the provision of wildlife habitat and travel corridors. In almost all instances, the studies recommend buffers consisting of ranges.

But the declaration of Schaumburg shows that such knowledge was not available to the County and Ecology and that additional research was needed on this issue. The studies relied upon are inadequate to the task.[4] At ¶¶ 20 to 47, Schaumburg lifts the curtain of fog on the "science" that Ecology and the County sold to the Board and is attempting to sell to this Court. The inadequacy is revealed in Ecology's Brief at 18, notes 16 to 18, where the work of Brennan, et al., 2009 and., 1994 are particularly cited. But Desbonnett et al state that

> [a]lthough the documenting research for actual performance along the coast is relatively meager, the function mechanisms that apply to inland riparian buffers *should similarly apply* to coastal buffers, Until such time that research on coastal vegetated buffer function, use, and benefit are better developed, *it will have to be assumed* that inland buffer information approximates that of the coast.

Declaration of Schaumburg at page 20; emphasis added.

"Meager" is what CAPR and OSF have been saying all along about the evidence for the various buffers in this SMP. It does not matter how many "interdisciplinary science panel[s]" one convenes, if you don't have the data, you don't have the data. *See*, Schaumburg, ¶¶ 25 and 26. In the absence of pertinent data, Ecology relies on syntheses of synthesized work, and

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[4] Declaration of Kim Schaumburg re Cited Scientific Literature in Support of Jefferson County Marine Buffers and Limits of Use. See Petitioners Olympic Stewardship Foundation, et al.'s *Second Supplemental* Evidence Submittal Re Constitutional Claims.

those synthesized works are not from marine shorelines. Schaumburg at 24, ¶ 25. For Ecology and the County to argue that this is as good as they can do given the amount of private property being taken is a violation of substantive due process. (For amount of affected property, 14.28 square miles, see Farr declaration at ¶¶ 8–10.)

At 38 of its response, the County says that "CAPR cites no authority for the proposition that shoreline buffers serve no rational purpose." CAPR did not so argue. It does argue that the currently established buffer are irrational because they are not anchored by site-specific science and economic impact studies. With respect to site-specific science, Ecology admits as much at 24 of its brief where it explains "the standard buffers in the SMP are just a starting place." Presumably, if the property owners can afford the expert help, it may be possible to alter a buffer. CAPR expects this will prove another "*de facto* prohibition."

In disputing CAPR's argument of insufficient justification for 150-foot buffers, Ecology relies on its own SMP Handbook. (This is akin to quoting one's own brief as dispositive authority.) Particularly, Ecology relies on the page of the handbook found at AR 4344 (Ecology Brief beginning at 32 with cite at 33), where it is claimed "[r]ecent scientific studies show that 25-foot setbacks do not protect most ecological functions ...." Such

conclusory statements do not establish anything, certainly not scientific justification for 150-foot buffers.

At 36 of its response, Ecology states that "CAPR relies on comments submitted by Dr. Flora for the proposition that development in the shoreline does not cause impacts." But what Dr. Flora actually wrote at the page cited by Ecology (AR 2447), was "[a] well-known Northwest contract-research firm has shown that a broad array of man-caused features along tidewater shores have no meaningful impact on 'ecosystem functions'." Flora based this assessment on data collected by Battelle Marine Sciences Laboratory. Flora did not say that Battelle stated this fact, rather through analysis Flora *shows* that Battelle's data exhibits essentially no correlation between "stressors" (i.e., human developments) and habitat quality. AR 2247–56; *see also* CAPR opening brief at 32–34.[5]

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[5] Ecology complains that the Battelle data "does not appear to be in the record." Ecology response at 36, n. 33. But it is clearly sourced in footnotes 1 and 2 of Flora's Notes at AR 2454 as well as the Bainbridge Island data set being presented graphically at AR 5626 and 5627. Also in this note, Ecology complains that the "relevance to Jefferson County" of Bainbridge Island and east Kitsap County shoreline data "has not been established." This is a remarkable assertion considering the citations relied upon in the Jefferson County Final Shoreline Inventory and Characterization Report. Examination of the Inventory's Literature Cited at AR 6477–96 shows that Respondents relied on studies not only from throughout the Puget Sound Lowlands (e.g., King and Skagit counties) but from British Columbia, Alaska, California, Oregon, North Dakota, and Tanzania to justify their preferences.

At 36 of its response, Ecology states that "Dr. Flora's work has been criticized by scientists with expertise in issues affecting Puget Sound. CP 5617–18." But these pages of the record are actually an email from a concerned citizen, Norm MacLeod, to Erik Stockdale of Ecology, forwarding Flora's response to these critics. So, we know critics exist but the actual criticism is not presented. At AR 5619–27, Flora's response to those critics is presented. Of particular interest are the graphs at AR 5626 and 5627 that show the lack of correlation in Battelle's Bainbridge Island data between stressors in general and habitat welfare (AR 5626) and between bulkhead footage in a particular reach of shoreline and habitat index (AR 5627).

Ecology next asserts that Flora's "comments were considered by the County and Ecology," citing AR 2381 and 5631–33 at 36 of its brief. AR 2381 is the page in the *Bibliography of Scientific and Technical Information Considered* where Flora's papers are simply listed. The extend of the consideration is indicated at AR 5631–33. There, Jeffree Stewart, Ecology's lead on the Jefferson County SMP, introduces this consideration in an email to other Ecology employees noting that "[y]ou may or may not have seen this previously .... it did not strike me as something important for your review when it came in, but it does now as it relates to your recent meeting in Seattle and some of the things you heard from the Jefferson County

property rights contingent." (Ellipsis in original.) Following this cavalier dismissal is an email from then Jefferson County lead SMP planner Michelle McConnell telling Ecology that studies by Flora where received by the Board of County Commissioners and at least one paper the "Board has considered ...." AR 5631–32.

If Ecology and the County did engage in a reasoned process that considered competing scientific information as *OSF v. WWGMHB*, 166 Wn. App. 172, 191, 274 P.3d 1040 (2012) requires, they have not shared it.

B. Excessive Delegation To the Discretion of Regulators

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."
> "The question is," said Alice, "whether you can make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master — that's all."

LEWIS CARROLL, THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE, CH. 6, 1871.

The County at 35 of its brief, responding to CAPR's argument that it is the Shoreline Management Act that is entitled to liberal construction not the SMP, argues that the SMP itself must be liberally construed to carry out its purposes. But in *Morin v. Johnson,* 49 Wn.2d 275, 279, 300 P.2d 569 (1956), our Supreme Court noted that

> [i]t must also be remembered that zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.

In *Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987) the Court qualified this: "such preference to property owners is only warranted to the extent ambiguity exists."

The SMP creates ambiguity on its face. The Shoreline Management Act at RCW 90.58.900 simply states that "[t]his chapter is exempted from the rule of strict construction, and it shall be liberally construed to give full effect to the objectives and purposes for which it was enacted." But JCC 18.25.080 runs riot over the Legislature's reasonable guide to interpretation, stating in its entirety that

> [t]his Program is exempt from the rule of strict construction; therefore this Program shall be liberally construed to give full effect to its goals, policies and regulations. Liberal construction means that the interpretation of this document shall not only be based on the actual words and phrases used in it, but also by taking its deemed or stated purpose into account. Liberal construction means an interpretation that tends to effectuate the spirit and purpose of the writing. For purposes of this Program, liberal construction means that the administrator shall interpret the regulatory language of this Program in relation to the broad policy statement of RCW 90.58.020, and make determinations which are in keeping with those policies as enacted by the Washington State Legislature.

However, our Supreme Court has also insisted on a rule of reason when interpreting zoning ordinances. "Zoning codes must be *reasonably construed* in order to effectuate the purposes for which they are adopted. *State ex rel. Edmond Meany Hotel, Inc. v. City of Seattle*, 66 Wn.2d 329, 402 P.2d 486 (1965)." *Dando v. King County*, 75 Wn.2d 598, 601, 452 P.2d 955 (1969); emphasis added.

It can be expected that when an administrator can interpret the SMP based not only "on the actual words and phrases used in it, but also by taking its deemed or stated purpose into account," then property owners are liable to rule by whim and personal preference. This is an intolerable and *unreasonable* situation. Hence, CAPR's allegation that the vagueness of the SMP lends excessive delegation to regulators and a *de facto* prohibition on common shoreline structures and uses stands, no matter what the "use tables" of the SMP say.

C. THE *DE FACTO* PROHIBITION OF COMMON SHORELINE FACILITIES AND THE IMPOSITION OF OPPRESSIVE CONDITIONS

In its opening brief, CAPR argues that the SMP creates a *de facto* prohibition on common shoreline developments. Further, CAPR argues that the Respondents' exercise of police power violates Petitioners' constitutionally protected substantive due process rights, creating "needless economic dislocation produced by agency officials zealously but

unintelligently pursuing their environmental objectives." *Bennett v. Spears,* 520 U.S. 154, 177, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1977).

The County and Ecology dispute CAPR by discussing the extensive "use tables" where various shoreline uses are ostensibly allowed. (*See, e.g.,* County Brief at 34 and 36.) This misses the point. Something might be "allowed" pursuant to a use table but in fact is impossible to do. Barbara Blowers in her declaration of February 26, 2016, at ¶ 7 gives an example.[6]

> There are at least 40 SPAADs [Site Plan Advanced Approval Determinations] I have, which are now expiring. Most of these have a 30-foot setback that now face a 150-foot buffer and a 10-foot setback. I have been trying to find out what will be necessary to make the lots buildable. In two cases having a 160-foot setback and buffer places the house to the back of the lot on top of the septic area prohibiting a way to build.

This is what CAPR means by a *de facto* prohibition. Single-family residences are an allowed use — in fact a preferred one — but many cannot be built under the new SMP. This is the kind of economic cost that needed to be assessed before the SMP was adopted. There are approximately 877 vacant waterfront lots in Jefferson County. Blowers Decl. at ¶ 6. How many have been rendered unbuildable?

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[6] Declaration of Barbara Blowers Re Complexity and Cost of Shoreline Application Process as Applied to the New Jefferson County Shoreline Master Program; submitted by OSF. Ms. Blowers is a Port Townsend-based real estate agent specializing in waterfront property in western Washington, She assists buyers obtain required development permits. Blowers Decl. at ¶¶ 2 and 5.

The County argues in its response at 38 that facial substantive due process challenges are disallowed by *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 339, 787 P.2d 907 (1990). But following *Estate of Freidman v Pierce Cy.*, 112 Wn.2d 68, 768 P.2d 462 (1989), *Presbytery* simply suggests that "it will be the uncommon case where a landowner can show a constitutional violation without first exhausting available procedures in an attempt to secure a permit for possible use." *Id.* at 339.

However, *Presbytery,* like *Estate of Freidman,* is an inverse condemnation case seeking monetary damages, not an APA challenge to a countywide zoning ordinance. *Presbytery*, 114 Wn.2d. at 323. As such, it is necessary to apply for permits to see what is actually being taken. "Courts cannot address inverse condemnation claims in a vacuum." *Estate of Freidman*, 112 Wn.2d at 80. This is why the *Presbytery* court is concerned with the question of what is the proper remedy, monetary award or invalidation of the rule. *Id.* at 332. There is no categorical statement in *Presbytery* that substantive due process claims must never be facial challenges.

By analogy, our Supreme Court in *In re Custody of Smith*, 137 Wn.2d 1, 969 P.2d 21 (1998) struck down as unconstitutional two sections of the RCW allowing a petition for child visitation by nonparents. The case consolidated three actions where such visitation was granted by the trial

courts and parents appealed. Finding the raising of children to be a fundamental right — as is ownership of property (*see, e.g., Dennis v. Moses*, 18 Wash. 537, 571, 52 P. 333 (1898); *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902) — the Court found that the statutes "impermissibly interfere with a parent's fundamental interest in the care, custody and companionship of the child." *In re Custody of Smith* at 21, internal quote omitted. Our Supreme Court thought these statues could *never be applied constitutionally* as they gave "any person" the right to petition for visitation and gave no particular weight to a fit parent's opinion in the matter.

Appeal of *In re Custody of Smith* to the US Supreme Court was taken and a writ of certiorari granted under *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). The Washington Court was upheld. Justice Souter, in a concurring opinion, succinctly describes the posture of the case and it's correct resolution on substantive due process grounds.

> I concur in the judgment affirming the decision of the Supreme Court of Washington, whose *facial invalidation* of its own state statute is consistent with this Court's prior cases addressing the substantive interests at stake. I would say no more ...
>
> The Supreme Court of Washington invalidated its state statute based on the text of the statute alone, *not its application to any particular case.*

Troxel, 530 U.S. at 75–76; emphasis added. Similarly at *id.* 79, Justice Souter writes "I do not question the power of a State's highest court to

construe its domestic statute and to apply a demanding standard when ruling on its facial constitutionality ....)[7] While Justice O'Connor's plurality opinion in *Troxel* frequently uses the words "as applied," Justice Souter is correct about what the Washington and US Supreme Courts were doing, i.e., treating Granville's appeal as a facial challenge to the statute and finding it could never be applied in a constitutionally valid manner. This is what CAPR is arguing about a rule that *ab initio* takes a 150-foot conservation easement from every marine shoreline property owner in Jefferson County. And the US Supreme Court finds a *facial*, substantive due process challenge is a proper way to do so, no matter the County's crabbed reading of *Presbytery*.

The County's attempt at 38 to make facial substantive due process challenges somehow different in land use or environmental cases is unavailing. An example of such a facial challenge to a zoning ordinance,

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[7] *See, also*, dissent of Justice Stevens at 81: "the Court should begin by recognizing that the State Supreme Court rendered a federal constitutional judgment holding a state law invalid *on its face*." Emphasis added. *Also*, Stevens at 81: "Despite the nature of this judgment, Justice O'Connor would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied. *Ante,* at 2059–2060, 2060–2061, 2064 (plurality opinion). I agree with Justice Souter, *ante,* at 2065–2066, and n. 1 (opinion concurring in judgment), that this approach is untenable." *Likewise*: "For the purpose of a facial challenge like this ....) *Id.* at 90.

See, also, Justice Kennedy's dissent at 94: "Although parts of the [Washington] court's decision may be open to differing interpretations, it seems to be agreed that the court invalidated the statute *on its face*, ruling it a nullity."

albeit unsuccessful in the particular, is *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926).

> [W]here the equitable remedy of injunction is sought, as it is here, not upon the ground of a present infringement or denial of a specific right, or of a particular injury in process of actual execution, but upon the broad ground that the mere existence and threatened enforcement of the ordinance, by materially and adversely affecting values and curtailing the opportunities of the market, constitute a present and irreparable injury, the court will not scrutinize its provisions, sentence by sentence, to ascertain by a process of piecemeal dissection whether there may be, here and there, provisions of a minor character, or relating to matters of administration, or not shown to contribute to the injury complained of, which, if attacked separately, might not withstand the test of constitutionality.

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 529, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005), particularly describes *Ambler Realty* as a case sounding in due process.

To bring a facial challenge, no matter what the subject, a plaintiff still must have standing, including an injury in fact. Petitioners Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan have such injury (as do other CAPR members) and they pleaded it (Clerk's Papers 185), allegations not controverted by Respondents.

F. Due Process Was Denied by Lack of a Neutral Tribunal In the First Instance of Review

CAPR, in the space available, replies to only one point raised by Respondents in their argument against the claim of denial of due process by

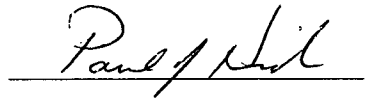
the absence of an impartial adjudicator in the first instance of review. *See*, CAPR Brief at 45–49. Both Respondents note that portion of CAPR's argument about the makeup of the Board, while Ecology gives only short shrift to CAPR's argument as to why this is important. i.e., the standards of review that this Board, to which courts are to grant deference, applies to petitions for review — clearly erroneous for shorelines of the state and clear and convincing evidence for shorelines of statewide significance. These standards applied by this board are the crux of the matter.

III. CONCLUSION

For the reasons argued by all Petitioners in this consolidated action, the current SMP of Jefferson County should be vacated and Petitioners awarded their reasonable attorney fees and other expenses under the Equal Access to Justice Act, RCW 4.84.340 et seq.

Dated: June 20, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the date indicated below I served the forgoing brief on the following counsel of record by USPS Mail, postage prepaid, or email where indicated.

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June 20, 2016

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RE: **D2 476410--OLYMPIC STEWARDSHIP FOUNDATION V. WA STATE DEPT OF ECOLOGY-- CAPR Reply Brief**

Dear Clerk Ponzoha:

Enclosed are two copies, including the original, of the Reply Brief of Citizens' Alliance for Property Rights Jefferson County, Citizens' Alliance for Property Rights Legal Fund, Mats Mats Bay Trust, Jesse A. Stewart Revocable Trust, and Craig Durgan (collectively CAPR) in the above–referenced appeal. A Certificate of Service is attached to the brief.

Thank you,

Paul J. Hirsch